Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

RICKY EUGENE MORROW,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
SCHAFFER & HENLEY
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555
(713) 951-9854 (facsimile)

Counsel for Petitioner,
Ricky Eugene Morrow

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

48 pp

QUESTIONS PRESENTED

Whether counsel representing a client under a death sentence has a duty to explain the effect of guilty pleas to non-capital charges if the capital case is reversed on appeal.

(a) Whether the effect of the guilty pleas on the capital case is a collateral or direct consequence.

(b) Whether counsel has a duty to explain the effect of the guilty pleas even if it is a collateral consequence.

(c) Whether counsel's incorrect advice regarding the effect of the guilty pleas vitiates the voluntariness of those pleas even if it is a collateral consequence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals, which held that counsel representing a client under a death sentence has no duty to explain the effect of guilty pleas to non-capital charges if the capital case is reversed on appeal; thus, petitioner's uninformed guilty pleas were not involuntary.

OPINION BELOW

The Court of Criminal Appeals, with two judges dissenting, denied habeas corpus relief in a published opinion on May 21, 1997 (Appendix A) and denied rehearing on October 1, 1997 (Appendix B). *Ex parte Morrow*, 952 S.W.2d 530 (Tex. Crim. App. 1997).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On January 19, 1982, petitioner committed a bank robbery while his wife waited in the getaway car. They went directly to another bank, where petitioner shot and killed a bank employee during a robbery. They immediately went to a motel and rented a room. Minutes later, an officer observed their car in the motel parking lot. Numerous law enforcement officers arrived at the motel, converged on the room, and demanded their surrender. Petitioner's wife left the room but he refused to do so. After he fired two shots, officers fired a barrage of gunfire into the room. Thereafter, he surrendered.

Petitioner was charged with aggravated robbery at the first bank, capital murder at the second bank, and two attempted capital murders of law enforcement officers at the motel. The court appointed Bill Bratton and Ron Goranson to represent him; Bratton was lead counsel.

Petitioner was tried for capital murder. A jury convicted him, and on November 9, 1983, assessed his punishment at death. Two weeks later, pursuant to a plea agreement, he pled guilty to the two attempted capital murder and the aggravated robbery charges for concurrent 50 year sentences.

Several weeks later, the trial court denied petitioner's motion for new trial in the capital murder case and he gave notice of appeal. Bratton and Goranson remained as counsel. On March 30, 1988, the Court of Criminal Appeals reversed the capital murder conviction due to error in the selection of the jury. *Morrow v. State*, 753 S.W.2d 372 (Tex. Crim. App. 1988).

The trial court appointed Keith Jagmin and Dan Solis to represent petitioner at the retrial of the capital murder; Jagmin was lead counsel. Petitioner was convicted, and on November 8, 1990, sentenced to death. He gave notice of appeal.

On January 12, 1994, petitioner filed a state habeas corpus petition challenging the voluntariness of his guilty pleas to the attempted capital murder and aggravated robbery charges. The district court conducted an evidentiary hearing and made findings of fact and conclusions of law recommending that relief be denied.[1] On May 21, 1997, the Court of Criminal Appeals denied relief, and on

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[1] While the state habeas petition was pending, the capital murder conviction was affirmed on appeal. *Morrow v. State*, 910 S.W.2d 471 (Tex. Crim. App. 1995), *cert. denied*, 134 L.Ed.2d 784 (1996). It is presently on habeas corpus review.

October 1, 1997, denied rehearing. *Ex parte Morrow*, 952 S.W.2d 530 (Tex. Crim. App. 1997).

REASONS FOR GRANTING THE WRIT

PETITIONER'S GUILTY PLEAS WERE INVOLUNTARY AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL.

At the 1983 capital murder trial, the State offered testimony that petitioner fired two shots at law enforcement officers from inside the motel room. Petitioner did not testify. The only evidence concerning his version of what occurred came from a psychiatrist, who testified that petitioner said that he shot into the ceiling in an attempt to provoke the officers to kill him.

Several days after petitioner was convicted of capital murder and sentenced to death, and before he filed a motion for new trial and notice of appeal, lead counsel Bill Bratton advised him that the State had offered a plea bargain of concurrent 50 years sentences and the return of all money seized that was unrelated to the bank robberies if he would plead guilty to the attempted capital murder and aggravated robbery charges. Petitioner maintained, as he had from the outset, that he did not shoot at or intend to kill the officers; rather, he shot into the ceiling in an effort to provoke them to kill him. Counsel responded that the jury would not believe him, especially since counsel found no physical evidence to support his position. More important, counsel said that he was confident that the Court of Criminal Appeals would reverse the capital murder conviction, and that the guilty pleas

and convictions on the non-capital charges would have no adverse effect if the capital murder conviction was reversed and the case was retried.

Counsel did not advise petitioner that if the capital murder conviction was reversed and the case retried, the guilty pleas, judicial confessions, and convictions could be used (a) to impeach his testimony; (b) to rebut his testimony that he did not shoot at or intend to kill the officers; (c) to rebut inferentially his testimony that he did not intentionally shoot the bank employee; (d) as evidence of his prior criminal record to support an affirmative answer to the special issue on future dangerousness; and (e) in support of prosecutorial argument that a life sentence would not constitute any punishment because he was already serving 50 years. Had counsel advised petitioner of any of these matters, he would not have signed judicial confessions admitting that he shot at and intended to kill the officers, nor would he have pled guilty to the charges.

Petitioner found the proposed plea bargain to be attractive, because his wife and he had no money, and he did not want her to go to prison without any money. He agreed to accept the plea bargain, primarily to obtain the return of the money, which he believed to be about $5,000.00. He saw no disadvantage to accepting the plea bargain because counsel had told him that it would have no adverse effect if the capital murder conviction was reversed and the case was retried.

On November 23, 1983, petitioner entered into written plea agreements, signed judicial confessions, and pled guilty to the attempted capital murder and aggravated

robbery charges for concurrent sentences of 50 years. The State agreed in writing to return all money seized from his wife and him after their arrests. Thereafter, the State returned $2,500.00 to counsel, who gave $1,500.00 to petitioner and his wife, and kept the remaining $1,000.00.

On March 30, 1988, the Court of Criminal Appeals reversed the capital murder conviction due to error in the selection of the jury. At the 1990 retrial, petitioner testified that he shot the bank employee when his gun discharged accidentally, and at the motel, he fired two shots into the ceiling rather than at the officers. On cross-examination, the State impeached him with his guilty pleas, judicial confessions, and convictions on the attempted capital murder and aggravated robbery charges. During summation, the prosecutor argued, in essence, that a sentence less than death would not constitute punishment because petitioner was already serving 50 years sentences.

A. THE STANDARD FOR DETERMINING THE VOLUNTARINESS OF A GUILTY PLEA.

Petitioner had a right to the effective assistance of counsel at trial. U.S. CONST. amends. VI & XIV; *Powell v. Alabama*, 287 U.S. 45 (1932). Counsel must act within the range of competence demanded of counsel in criminal cases. *McMann v. Richardson*, 397 U.S. 759 (1970).

An involuntary guilty plea must be set aside as a denial of due process of law. U.S. CONST. amends. V & XIV; *Boykin v. Alabama*, 395 U.S. 238 (1969). Voluntariness is to be determined by considering all relevant circumstances surrounding the plea. *Brady v. United States*, 397

U.S. 742 (1970). Where a defendant contends that he pled guilty based on the erroneous advice of counsel, he must show that counsel's advice fell below an objective standard of reasonableness, and but for that advice, there is a reasonable probability that he would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985).

B. THE EFFECT OF THE GUILTY PLEAS TO THE NON-CAPITAL CHARGES ON THE CAPITAL CASE IS NOT "COLLATERAL."

A majority of the Court of Criminal Appeals predicated the denial of relief on the premise that the effect of petitioner's guilty pleas, judicial confessions, and convictions in the non-capital cases on the retrial of the capital case was a collateral consequence, ignorance of which did not render the pleas involuntary. *Ex parte Morrow*, 952 S.W.2d at 536-37. The majority relied on cases which, for the most part, concern the indirect civil or administrative consequences of a guilty plea, rather than the direct, foreseeable criminal consequences.

The distinction between the direct and collateral consequences of a guilty plea "turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1366 (4th Cir.), *cert. denied*, 414 U.S. 1005 (1973). Generally, a defendant need be advised only of the direct consequences of a guilty plea. *United States v. Long*, 852 F.2d 975 (7th Cir. 1988).

The cases discussing collateral consequences generally encompass three categories. The first category

involves the loss of civil rights, such as the right to vote, *United States v. Cariola*, 323 F.2d 180 (3d Cir. 1963); travel, *Meaton v. United States*, 328 F.2d 379 (5th Cir. 1964), *cert. denied*, 380 U.S. 916 (1965); and, possess firearms. *People v. Ford*, 86 N.Y.2d 397, 657 N.E.2d 265 (N.Y. 1995). The second category involves administrative consequences, such as deportation, *United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985); undesirable discharge from the armed forces, *Redwine v. Zuchert*, 115 U.S. App. D.C. 130, 317 F.2d 336 (1963); commitment to a mental health facility, *Cuthrell v. Director, Patuxent Institution, supra;* and, civil forfeiture. *Harris v. Allen*, 929 F.2d 560 (10th Cir. 1991). The third category involves sentence-related matters, such as loss of good time credit, *Hutchison v. United States*, 450 F.2d 930 (10th Cir. 1971); possible consecutive sentences, *United States v. Vermeulen*, 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971); and, subsequent enhancement of punishment. *United States v. Lambros*, 544 F.2d 962 (8th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977). Petitioner does not dispute that a defendant's ignorance of such matters, which are only tangentially related to the criminal charge, do not vitiate the voluntariness of a guilty plea to that charge.

Petitioner's case presents a different, much more serious situation, which compels a different rule. Counsel represented petitioner in a capital murder case and three non-capital cases arising from a continuous sequence of events. Petitioner had been sentenced to death in the capital case when he pled guilty to the non-capital charges. The guilty pleas, judicial confessions, and convictions in the non-capital cases would directly affect the capital case if it was reversed and retried. The district

court found that counsel's "decision to allow [petitioner] to plead guilty to [the non-capital] cases was part of an overall trial strategy in his representation of [petitioner] in these cases as well as in [petitioner's] capital murder case" (Finding of Fact 7).

The majority's finding of "collateral consequences" is inconsistent with the district court's finding of "an overall trial strategy" in all four cases. Counsel's representation of petitioner in all four cases should be viewed as a "unitary proceeding" with the desired goal of saving his life, not as four separate, unrelated proceedings. The effect of the guilty pleas, judicial confessions, and convictions were hardly collateral to the capital case – they were important, direct, and foreseeable, especially in view of the fact that counsel predicted that the capital case would be reversed. Thus, as the dissent would have held, the "collateral consequence" rule should not apply to this scenario. *Ex parte Morrow*, 952 S.W.2d at 539-40.

C. COUNSEL HAS A DUTY TO ADVISE A CLIENT UNDER A DEATH SENTENCE OF THE EFFECT OF GUILTY PLEAS TO NON-CAPITAL CHARGES IF THE CAPITAL CASE IS REVERSED ON APPEAL.

The majority held that counsel has no duty to advise a defendant under a death sentence of the effect of guilty pleas, judicial confessions, and convictions to non-capital charges if the capital case is reversed and remanded for a retrial. *Ex parte Morrow*, 952 S.W.2d at 536-37. The majority found that the capital case was not "pending," as

petitioner's death sentence was on appeal. *Id.* at 535, n.6.[2] However, the majority conceded that if the capital case was "pending," it was *"arguable* that counsel would have had a duty to inform [petitioner] of the State's possible use of such guilty pleas and judicial confessions." *Id.*

There should be no distinction, for present purposes, between a pending, unadjudicated capital case and a death sentence awaiting appeal. Had petitioner's death sentence been affirmed and habeas corpus relief thereafter denied, he would have been executed; the disposition of the non-capital cases would not have mattered. The effect of the guilty pleas, judicial confessions, and convictions would be relevant only if the capital case was reversed and retried. In that event, they could be used to impeach petitioner's credibility, to rebut his testimony, to show his prior criminal record at the punishment stage, and to support an argument that he should be sentenced to death instead of life. Thus, it does not matter that the capital case was awaiting appeal instead of trial. When petitioner pled guilty to the non-capital charges, he did not have a final conviction for capital murder; that case was still subject to resolution by a jury at a retrial. There is no basis to distinguish between counsel's duty to advise his client of the effect of the guilty pleas, judicial confessions, and convictions on a capital case awaiting trial, as opposed to a death sentence awaiting appeal.

The majority further found that petitioner failed to prove that counsel's failure to advise him of the various

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[2] Actually, the capital case was pending in the trial court, awaiting the filing of a motion for a new trial, when petitioner pled guilty to the non-capital charges.

ways that his guilty pleas could be used against him at a retrial of the capital case was "outside the wide range of competence demanded of attorneys in criminal cases." *Ex parte Morrow*, 952 S.W.2d at 536-37. On the contrary, petitioner presented the testimony of Ron Goranson, co-counsel at the first capital murder trial, and Brian Wice, an expert witness, that a reasonably competent lawyer would not advise his client to plead guilty to non-capital charges with a death sentence awaiting appeal, especially without providing an explanation of the consequences.

In the final analysis, counsel's duty to provide this advice does not depend on whether the effect of the guilty pleas, judicial confessions, and convictions is labeled as a direct or collateral consequence. As the dissent observed, even if these consequences are collateral, counsel still had a duty to advise petitioner of them. *Id.* at 540. A reasonably competent criminal defense lawyer, representing a client under a death sentence, has a duty to advise him of the likely consequences of guilty pleas, judicial confessions, and convictions on non-capital charges if the capital case is reversed and retried. See *Teague v. State*, 772 S.W.2d 932 (Tenn. Crim. App. 1988), *cert. denied*, 493 U.S. 874 (1989).

D. COUNSEL'S INCORRECT ADVICE REGARDING THE EFFECT OF GUILTY PLEAS TO THE NON-CAPITAL CHARGES ON THE CAPITAL CASE VITIATES THE VOLUNTARINESS OF THOSE PLEAS.

The majority analyzed the issue as if counsel had given no advice to petitioner regarding the effect of the

guilty pleas, judicial confessions, and convictions. Even assuming *arguendo* that their effect on the capital case is a collateral consequence, ignorance of which does not render the pleas involuntary, counsel's affirmatively inaccurate advice to petitioner regarding the consequences compels a different result.

Counsel conceded that he did not think that it would be dangerous for petitioner to plead guilty to the non-capital charges even if the capital case was reversed; that he did not think there would necessarily be adverse consequences; that he thought it would benefit petitioner at a retrial of the capital case to have signed judicial confessions admitting that he shot at two officers with the intent to kill them; and, that he told petitioner that there was no "downside prospect" that these convictions could hurt him at a retrial of the capital case. Two weeks after the guilty pleas, counsel wrote a letter to petitioner's father explaining that petitioner had pled guilty to the non-capital charges for 50 year sentences, and that the pleas were "of no consequence save and accept [sic] for the fact that if the death penalty case is reversed it might serve as the basis for which to dispose of it without a retrial." Thus, counsel affirmatively misled petitioner regarding the effect of the guilty pleas on the capital case. This misadvice rendered the guilty pleas involuntary, regardless of whether the consequences are labeled as direct or collateral.

Although a defendant need not be informed of the collateral consequences of a guilty plea if he does not inquire, when counsel misinforms him, and he relies upon that misinformation in pleading guilty, he is denied the effective assistance of counsel. *Strader v. Garrison*, 611

F.2d 61 (4th Cir. 1979), *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988), and *Czere v. Butler*, 833 F.2d 59, 63, n.6 (5th Cir. 1987) (parole eligibility); *People v. Correa*, 108 Ill.2d 541, 485 N.E.2d 307 (Ill. 1985) (deportation). Thus, while counsel's failure to advise a defendant of the collateral consequences of a guilty plea does not invalidate the plea, misadvice does. *Adkins v. State*, 911 S.W.2d 334, 350 (Tenn. Crim. App. 1994).

In petitioner's case, the aggravated robbery, capital murder, and attempted capital murders were interrelated through a continuous sequence of events. Counsel represented petitioner in all four cases. Reasonably competent counsel could not contemplate the disposition of the non-capital charges without considering their effect on the capital case. Petitioner's guilty pleas to the non-capital charges clearly would, and did, have a substantial effect on any retrial of the capital case.

Texas requires counsel to advise the defendant how the law applies to the facts of the case to ensure that a guilty plea is knowing and voluntary. *Ex parte Morse*, 591 S.W.2d 904 (Tex. Crim. App. 1980). The failure to provide accurate advice concerning whether or not to accept a plea bargain constitutes ineffective assistance of counsel. *Ex parte Raborn*, 658 S.W.2d 602 (Tex. Crim. App. 1983).

Counsel told petitioner, and later confirmed to his father, that the guilty pleas would be of no consequence, except that they might help petitioner avoid a death sentence if the capital case was reversed. Counsel conceded at the habeas hearing that he did not see the danger lurking behind the guilty pleas. Petitioner had absolutely nothing to gain by entering the guilty pleas,

especially where counsel (accurately) predicted that the capital case would be reversed, and the prosecutor acknowledged that the State would have returned the money whether or not petitioner pled guilty to the non-capital charges. See and compare *Teague v. State*, 772 S.W.2d at 939.

Counsel's misadvice regarding the effect of the guilty pleas distinguishes this case from those relied on by the majority. The majority opinion permits a lawyer representing a defendant in both capital and non-capital cases to mislead him (whether deliberately or inadvertently) regarding the effect of guilty pleas to the non-capital charges on the capital case. This issue is significant, as many capital murder defendants are also charged with non-capital crimes. Neither their fates, nor petitioner's, should depend on the erroneous advice sanctioned by the majority. Accordingly, this court should grant certiorari to resolve the conflict between petitioner's case and *Teague*.

CONCLUSION

Petitioner requests that this Court grant the petition for writ of certiorari.

Respectfully Submitted,

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
SCHAFFER & HENLEY
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555
(713) 951-9854 (facsimile)

Counsel for Petitioner,
Ricky Eugene Morrow

APPENDIX

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A. Opinion of the Texas Court of Criminal Appeals 1a

B. Order of the Texas Court of Criminal Appeals denying rehearing 27a

Ex parte Ricky Eugene MORROW.

No. 72593.

Court of Criminal Appeals of Texas,
En Banc.

May 21, 1997.

Rehearing Denied Oct. 1, 1997.

Randy Schaffer, Houston, for appellant.

Sue Korioth, Asst. Dist. Atty., Houston, Matthew Paul, State's Atty., Austin, for State.

Before the court en banc.

OPINION

MANSFIELD, Judge.

We ordered applicant Ricky Eugene Morrow's post-conviction application for writ of habeas corpus filed and set for submission to consider whether his guilty pleas were involuntary.[1] Pursuant to a plea bargain, applicant pleaded guilty to, and was convicted of, an aggravated robbery and two attempted capital murders. Applicant was then sentenced to three fifty-year concurrent sentences. No appeal was taken. Applicant now contends his guilty pleas were involuntary because: (1) the pleas were improperly induced by the State's offer to return money that belonged to him, and (2) he received ineffective

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[1] See Article 11.07 of the Texas Code of Criminal Procedure.

assistance of counsel.[2] Applicant requests that this Court "grant a writ of habeas corpus and order the State to show cause why applicant should not be granted a new trial." We will deny relief.

Relevant Facts

The convicting court held an evidentiary hearing on applicant's claims and made findings of fact. See Tex.Code Crim. Proc. art 11.07, § 2(d). Those findings, in pertinent part, are as follows: On January 19, 1982, applicant and his common-law wife, Linda Ferguson, went to a Dallas pawn shop and purchased two pistols. That afternoon they went to a Dallas bank. While Ferguson waited in the car, applicant went inside the bank and committed a robbery. Applicant and Ferguson then proceeded to a second bank. While Ferguson again waited in the car, applicant went inside and committed a second robbery, during which he shot and killed a bank employee. The two fled to a nearby motel and checked into a room with their weapons and proceeds from the two bank robberies.

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[2] This argument of ineffective assistance of counsel is premised on three contentions worded as follows: (1) Counsel advised applicant that the guilty pleas and convictions would have no adverse effect if applicant obtained a reversal of his capital murder conviction and was retried; (2) Counsel failed to obtain the State's agreement that if applicant's capital murder conviction was reversed, and applicant was retried, the convictions for attempted capital murder and aggravated robbery would not be used against him at retrial; and (3) Counsel had a conflict of interest because counsel would receive part of the money that would be returned as part of the plea bargain if applicant plead[ed] guilty.

Within minutes, after a police officer observed their car in the motel parking lot, their room was surrounded by police officers demanding their surrender. Ferguson surrendered voluntarily. Applicant refused and remained inside the motel room. After applicant fired two shots,[3] the police responded with a barrage of gunfire into the motel room. Applicant subsequently surrendered and was arrested.

Applicant was charged as follows: capital murder (cause no. F-82-83550); aggravated robbery (cause no. F-82-83706); and two attempted capital murders of the officers who were surrounding applicant's motel room (cause nos. F-82-82402, F-82-82403). The trial court appointed counsel who remained applicant's counsel during the disposition of all four cases.

The capital murder charge was disposed of first. Applicant was tried and convicted of capital murder (cause no. F-82-83550). On November 9, 1983, the jury assessed his punishment at death. Direct appeal to this Court was automatic.

On November 23, 1983, while the above conviction was on appeal, applicant entered into a plea bargain to dispose of the remaining charges of aggravated robbery

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[3] Whether applicant fired two shots at the officers with the intent to kill them is now in dispute. Applicant pleaded guilty to two attempted capital murders, pursuant to a plea bargain. However, at his retrial for capital murder, applicant testified that he did not shoot at the officers with the intent to kill them, but rather, he shot two bullets into the ceiling of the closet where he was hiding, thereby provoking the police officers to shoot and kill him.

and two attempted capital murders. Pursuant to the plea bargain, applicant pleaded guilty to each of the three charges. In return, applicant received three fifty-year sentences, which were to run concurrently, and all funds seized from him and Ferguson that were not related to the two bank robberies were to be returned to him.

On March 30, 1988, this Court reversed applicant's capital murder conviction. *Morrow v. State*, 753 S.W.2d 372 (Tex.Cr.App.1988). The trial court appointed new counsel to represent applicant at his retrial, which began in 1990. During this second trial, applicant testified on his own behalf at the guilt-innocence stage. When he testified as to the facts surrounding the two attempted capital murders and aggravated robbery, the State offered evidence of his judicial confessions, guilty pleas, convictions and fifty-year sentences to impeach his testimony. Likewise, such pleas, confessions, convictions, and sentences were used as evidence of applicant's prior criminal record at the punishment stage. Applicant was again convicted of capital murder and his punishment assessed at death. Applicant now challenges the voluntariness of his guilty pleas in the two attempted capital murders and the aggravated robbery case.

"Involuntariness" under T.C.C.P article 26.13(b)

Applicant contends his three guilty pleas were "involuntary" because they were improperly induced by the State's promise to return his money as part of the plea bargain. Applicant submits that the plea bargain was premised on the State's promise to return to him all the money seized from him and Ferguson that was not

related to the two bank robberies. Applicant claims "he agreed to accept the plea bargain primarily to obtain the return of the money which he believed to be approximately $5,000.00."

Applicant's testimony at the habeas corpus hearing reflects he was persistent in trying to get the money returned even before the plea bargaining process began. Applicant testified that as early as the first interview with his court-appointed counsel, he was "trying to get that money back."

Applicant's counsel testified that he believed the State's promise to return applicant's money was not the reason applicant pled guilty. Counsel testified that although he did not know for sure applicant's reason for pleading guilty, counsel was certain the money was not a "quid pro quo for applicant's plea of guilty." Finally, counsel stated that *applicant* insisted that counsel get the State to agree to return the money as part of the plea bargain.

Likewise, the assistant district attorney who negotiated the plea bargain with applicant's counsel testified that he believed the money was not used as an inducement for applicant to plead guilty. The assistant district attorney testified that "it was applicant's property and he was going to get it back."

The trial court began its analysis of applicant's claim by finding that "the trial court in each of the guilty plea hearings properly admonished applicant of the consequences of the guilty pleas, accepted applicant's guilty pleas as voluntarily and intelligently entered based upon those admonishments, and sentenced applicant in accord

with the plea bargain."[4] The trial court, relying on the testimony of applicant's counsel and the prosecuting district attorney, found that although the plea bargain included a provision dealing with the return of money, the plea bargain was not *predicated* on the return of money, and applicant's decision to plead guilty was based on the evaluation of several factors, including "the surety of conviction based on the evidence available to the State, the beneficial offer by the State of the less-than-maximum concurrent sentences, and the necessity to dispose of the cases." In addition, the trial court found that, contrary to applicant's contention, the *State* did not "induce" the pleas by offering to return money, but rather it was *applicant* who insisted that the provision regarding the return of money be included in the plea bargain.

Article 26.13(b) of the Texas Code of Criminal Procedure provides that no plea of guilty or plea of nolo

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[4] The record shows applicant pleaded guilty and signed judicial confessions. In each corresponding judgment, the pertinent language reads as follows:

> " . . . before the Defendant entered his plea herein, the Defendant was arraigned and in open Court pleaded GUILTY to the charge contained in the indictment; thereupon the Defendant was admonished by the Court of the consequences of the said plea, and the Defendant persisted in entering said plea, and in plainly appearing to the Court that the Defendant is mentally competent and that he is *uninfluenced in making said plea by any consideration of fear, or by any persuasion*, or delusive hope of pardon prompting him to confess his guilt, the said plea was accepted by the Court and is now entered of record as the plea herein of the Defendant."

contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary. The purpose and function of Article 26.13 are to ensure that only a constitutionally valid plea is entered and accepted by the trial court. *See Meyers v. State*, 623 S.W.2d 397 (Tex.Cr.App.1981). In *Ex parte Shuflin*, 528 S.W.2d 610, 615 (Tex.Cr.App.1975), this Court, citing *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), recognized the requirements of a constitutionally valid plea of guilty:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). *Brady v. United States*, 397 U.S. at 755, 90 S.Ct. at 1472.

In addition, in a post-conviction habeas corpus hearing, the burden of proof is upon the applicant. *Ex parte Slaton*, 484 S.W.2d 102 (Tex.Cr.App.1972). This Court is not bound by the findings of the trial judge in post-conviction habeas corpus proceedings. *Ex parte Adams*, 707 S.W.2d 646 (Tex.Cr.App.1986); *Ex parte Williams*, 486 S.W.2d 566 (Tex.Cr.App.1972). But such findings are considered, if supported by the record. *Ex parte Hurd*, 613 S.W.2d 742 (Tex.Cr.App.1981).

In the instant case, the plea papers show, among other things, that one of the provisions of the plea bargain stated that all funds seized from applicant and Ferguson would be returned to applicant. However, the *mere inclusion* of such a provision in the plea bargain does not render applicant's pleas "involuntary." After all, at one level most pleas of guilty or nolo contendere are induced because they are entered to avoid more severe possible sentences upon a conviction following trial. See George E. Dix & Robert O. Dawson, *Criminal Practice and Procedure*, ch. 34, § 34.45, p. 407. Therefore, a showing of an inducement beyond that implicit in the plea bargaining process must be made to prevail on a claim that the pleas were "involuntary" because they were improperly induced. *Id.*

From the record before us, applicant has failed to prove by a preponderance of the evidence that his guilty pleas were "involuntary" because they were induced by threats, misrepresentations or improper promises. *Brady*, 397 U.S. at 755, 90 S.Ct. at 1472. On the other hand, the record does support the trial court's findings that applicant's guilty pleas were not predicated on the return of money but were the result of an informed decision based on the evaluation of several factors. *See Ex parte Adams*, 707 S.W.2d 646 (Tex.Cr.App.1986); *Ex parte Hurd*, 613 S.W.2d 742 (Tex.Cr.App.1981); *Ex parte Williams*, 486 S.W.2d 566 (Tex.Cr.App.1972). Applicant's first ground for relief is denied.

"Involuntariness" under the Sixth Amendment

We turn next to the question whether applicant's guilty pleas were involuntary because he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.[5]

Applicant claims first that defense counsel was ineffective for failing to accurately advise him of the possible "adverse consequences" his three guilty pleas would have in the event his capital murder case was reversed and retried.[6]

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[5] Applicant presents three arguments in support of his claim of ineffective assistance of counsel. They are worded as follows: "(1) Counsel *advised* applicant that the guilty pleas and convictions would have no adverse effect if applicant obtained a reversal of his capital murder conviction and was retried; (2) Counsel *failed to obtain* the State's agreement that if applicant's capital murder conviction was reversed, and applicant was retried, the convictions for attempted capital murder and aggravated robbery would not be used against him at retrial; and (3) Counsel had *a conflict of interest* because counsel would receive part of the money that would be returned as part of the plea bargain if applicant plead[ed] guilty." (emphasis added) Application for Writ of Habeas Corpus. We will address each argument separately.

[6] In effect, applicant asks us to decide the broader question of: whether a lawyer, when representing a client charged with both capital and non-capital cases, has a duty to explain the effect of guilty pleas in the non-capital cases on the capital case? However, that question is not properly before this Court because applicant stood convicted, with such conviction on appeal, at the time he entered his guilty pleas, and therefore such charges were not "pending." If such cases were "pending," it is *arguable* that counsel would have had a duty to inform applicant of the State's possible use of such guilty pleas and judicial confessions.

Applicant alleges counsel failed to inform him prior to the entry of his guilty pleas, that such pleas could be used at a potential capital murder retrial to:

> (1) impeach applicant; (2) rebut applicant's testimony that he did not intend to shoot at or intend to kill the police officers; (3) rebut, through inferences, applicant's testimony that he did not intentionally shoot the victim of the capital murder; (4) as evidence of applicant's prior criminal record to support an affirmative answer to the special issue regarding future dangerousness; and (5) support the prosecution's argument that applicant should be given the death penalty because he was already serving three, fifty-year concurrent sentences, and therefore, to give him a life sentence would be no real punishment at all. (Application for writ of habeas corpus, p. 14).

The State submits "applicant failed to prove his pleas were involuntary as a result of any failure by counsel to inform him of the possible use of his convictions in a separate, possible, future proceeding, because such use is a 'collateral consequence,' ignorance of which does not render the pleas involuntary." We agree.

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This right is not merely to the assistance of counsel, but rather to the reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). This right to the reasonably effective assistance of counsel applies at the time a defendant is called upon to enter his plea to a

felony charge. *McMann v. Richardson*, 397 U.S. 759, 770-71, 90 S.Ct. 1441, 1448-49, 25 L.Ed.2d 763 (1970).

However, courts have also held that while the Sixth Amendment assures an accused of effective assistance of counsel in criminal prosecutions, this assurance does not extend to "collateral" aspects of the prosecution. *Varela v. Kaiser*, 976 F.2d 1357 (10th Cir.1992), *cert. denied*, 507 U.S. 1039, 113 S.Ct. 1869, 123 L.Ed.2d 489 (1993). A consequence is "collateral" if it is not a definite, practical consequence of a defendant's guilty plea. *See Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1366 (4th Cir.1973), *cert. denied*, 414 U.S. 1005, 94 S.Ct. 362, 38 L.Ed.2d 241 (1973). Courts have characterized deportation, *United States v. Campbell*, 778 F.2d 764 (11th Cir.1985); possible enhancement of punishment, *United States v. Lambros*, 544 F.2d 962 (8th Cir.1976), *cert. denied*, 430 U.S. 930, 97 S.Ct. 1550, 51 L.Ed.2d 774 (1977); institution of separate civil proceedings against defendant for commitment to mental health facility, *Cuthrell v. Director, Patuxent Institution*, 475 F.2d at 1366; loss of good time credit, *Hutchison v. United States*, 450 F.2d 930, 931 (10th Cir.1971); possibility of imposition of consecutive sentences, *United States v. Vermeulen*, 436 F.2d 72, 75 (2nd Cir.1970), *cert. denied*, 402 U.S. 911, 91 S.Ct. 1390, 28 L.Ed.2d 653 (1971); deprivation of rights to vote and to travel abroad, *Meaton v. United States*, 328 F.2d 379 (5th Cir.1964), *cert. denied*, 380 U.S. 910, 85 S.Ct. 902, 13 L.Ed.2d 801 (1965); deprivation of the right to vote in some jurisdictions, *United States v. Cariola*, 323 F.2d 180 (3rd Cir.1963); and the possibility of undesirable discharge from the armed forces, *Redwine v. Zuckert*, 115

U.S.App.D.C. 130, 317 F.2d 336 (1963), as "collateral consequences" of which a defendant does not have to be knowledgeable before his plea is considered knowing and voluntary. *See Michel v. United States*, 507 F.2d 461, 465, n. 4. (2nd Cir.1974) (citations omitted). Therefore, when a defendant is fully advised of the direct consequences of her plea, her ignorance of a collateral consequence does not render the plea involuntary. *See United States v. Long*, 852 F.2d 975, 979-80 (7th Cir.1988).

When a defendant enters his plea upon the advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance of counsel, the voluntariness of such plea depends on (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and if not, (2) whether there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington*, supra; *McMann v. Richardson*, supra. Therefore, the question posed in the instant case is whether applicant has met his burden and proven that: (1) counsel's failure to inform applicant of the potential uses of his guilty pleas at a possible capital murder retrial was outside the range of competence demanded of attorneys in criminal cases; and (2) that but for defense counsel's errors, applicant would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. at 56, 106 S.Ct. at 369.

We conclude applicant has failed to meet the first prong of the *Hill v. Lockhart* test. We believe counsel was under no duty to inform applicant of the various ways his

three guilty pleas could be used against him at a possible capital murder trial because such use is "collateral," and not a definite, practical consequence of his guilty pleas. *See Cuthrell v. Director, Patuxent Institution,* 475 F.2d at 1366. Applicant has not proven by a preponderance of the evidence that counsel's alleged failure to advise him, *ad infinitum,* of the various ways such guilty pleas could be used against him at a hypothetical retrial, was "outside the wide range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart,* 474 U.S. at 56, 106 S.Ct. at 369. Accordingly, we conclude counsel's failure to advise applicant of the "collateral consequences" of his guilty pleas did not rise to the level of constitutionally ineffective assistance of counsel. *See United States v. Campbell,* 778 F.2d at 768. "To hold otherwise would place an unreasonable burden on defense counsel to ascertain and advise of the collateral consequences of a guilty plea which courts have uniformly held is not ineffective assistance of counsel." *United States v. Yearwood,* 863 F.2d 6 (4th Cir.1988) (citations omitted). "Although it is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty, it is not required by the Federal Constitution." *United States v. Campbell,* 778 F.2d at 765. Because applicant has failed to demonstrate error, we need not evaluate counsel's actions with respect to the second, "prejudice-prong" of the *Hill v. Lockhart* test.

Applicant alleges next that defense counsel was ineffective for failing to obtain a "non-use agreement" with the State wherein if applicant pleaded guilty the State would not use such guilty pleas, judicial confessions, and convictions against him in the event his capital murder

case was reversed and retried. Applicant argues (1) that reasonably competent counsel would have ensured that a "non-use" provision was made part of the plea bargain, and (2) that if the State refused to include a "non-use" provision as part of the plea bargain, reasonably competent counsel would have notified applicant and advised applicant to reject such a plea bargain and applicant would not have pleaded guilty but would have insisted on going to trial.

Applicant's counsel testified at the habeas corpus hearing that he did not attempt to obtain a "non-use" provision in the plea bargain because at the time he represented applicant, he had never attempted to obtain such type of provision, nor had he ever heard of anyone in Dallas County ever obtaining such a condition in a plea bargain. He stated that such an agreement was not commonplace in Dallas County in 1983. Counsel testified that even if he would have obtained such an agreement, applicant still would not have been protected from the use of such convictions at a possible retrial. Counsel reasoned that if applicant testified at the guilt-innocent stage differently from what he signed in his judicial confessions, the "non-use" agreement would not prevent the State from impeaching applicant with such pleas and confessions. Furthermore, counsel contended the State would not need to use the plea agreement, guilty pleas, judicial confessions or convictions as direct evidence of the facts surrounding the three felonies because they could call witnesses to produce such facts. Finally, counsel testified that he did not think it necessary to get a "non-use" agreement because he "never imagined any

competent counsel would put applicant on the stand to testify."

The assistant district attorney who negotiated the plea bargain also testified at the habeas corpus hearing. He testified that had applicant's counsel attempted to obtain a "non-use agreement" as a provision in the plea bargain he would not have agreed to such a request.

The trial court reasoned that because the facts and circumstances surrounding the contested offenses would have been admissible during both the guilt-innocent and punishment stages of the capital murder retrial with or without a "non-use agreement," counsel's attempt to secure such an agreement would have been futile. *See Mooney v. State*, 817 S.W.2d 693 (Tex.Cr.App.1991). Therefore, the trial court reasoned, counsel was not required to attempt to obtain such an agreement, because counsel is not required to perform futile acts to render effective assistance. *Id.* We agree.

We are not satisfied that applicant has sustained his burden with respect to the first prong of the *Hill v. Lockhart* test. Based on the testimony of applicant's counsel and the assistant district attorney, it would have been futile to attempt to obtain a "non-use agreement." The facts show that such a provision was uncommon and that even if such a provision was included in the plea bargain, applicant would still not have been protected from the State's use of such information for impeachment purposes. Accordingly, applicant has not proven that counsel's failure to obtain a "non-use agreement" was "outside the wide range of competence demanded of attorneys in criminal cases." Because applicant has failed

to meet the first prong of the *Hill v. Lockhart* test, we need not consider whether applicant has established "prejudice" as required by the second prong of *Hill v. Lockhart*.

Finally, applicant alleges counsel was ineffective because he had an actual conflict of interest. Applicant claims he and counsel entered into a contingency-fee type agreement, whereby counsel would receive 40% of the money applicant would receive pursuant to the plea bargain. Applicant contends counsel's financial interest in applicant accepting the plea bargain created a disincentive to provide any advice that might cause applicant to reject the plea bargain.

As noted previously, applicant's counsel testified at the habeas corpus hearing. Counsel categorically denied ever having a contingency-fee agreement with applicant. Counsel's testimony reflects that he made every effort to obtain the return of the money on applicant's behalf because *applicant* was insistent and feared going to prison without any money.

The trial court, in its findings of fact and conclusions of law, found applicant's claims alleging counsel had an actual conflict of interest at the time applicant entered his guilty pleas to be incredible. The court stated applicant had not established an actual conflict of interest or proven that if any money was kept by counsel, that it was kept under the terms of a contingency-fee agreement.

Ineffective assistance of counsel may result from an attorney's conflict of interest. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984). An "actual conflict of interest" exists if counsel is required to make a choice between advancing his client's

interest in a fair trial or advancing other interests (perhaps his own) to the detriment of his client's interest. *James v. State,* 763 S.W.2d 776, 779 (Tex.Cr.App.1989). In order for a defendant to demonstrate a violation of his right to the reasonably effective assistance of counsel based on a conflict of interest, he must show (1) that defense counsel was actively representing conflicting interests, and (2) that the conflict had an adverse effect on specific instances of counsel's performance. *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

Based on the record, it can not be said that applicant has met his burden of establishing an actual conflict of interest pursuant to the first prong of the *Cuyler v. Sullivan* test. Applicant has failed to demonstrate counsel was "actively representing conflicting interests." *Cuyler,* 446 U.S. at 348-50, 100 S.Ct. at 1718-19. On the contrary, the record shows, counsel acted zealously in attempting to secure the return of all monies which were to be returned to applicant pursuant to the plea bargain. The record shows that from around November 1983 to January 1984 counsel was in communication with the Dallas County District Attorney's office and the Dallas Police Department in an effort to obtain the $5,000.00 applicant believed he possessed at the time of his arrest. The record shows counsel acted in the interest of applicant and not out of his own. Accordingly, we are satisfied that the trial court's findings and conclusions are supported by the record and we therefore adopt such findings and conclusions with respect to applicant's allegation that counsel had an actual conflict of interest and a contingency-fee agreement. *See Ex parte Adams, supra,* at 648.

For these reasons, we hold applicant has failed to carry his burden of proving his pleas were involuntary because they were improperly induced by the State's promise to return his money as part of the plea bargain, or because he received ineffective assistance of counsel.

All relief prayed for is denied.

KELLER, J., not participating.

BAIRD, Judge, dissenting.

According to the majority, counsel was not ineffective for failing to inform applicant of the consequences of his guilty pleas because those consequences were collateral, not direct. However, in reaching that conclusion, the majority fails to conduct any analysis regarding what constitutes a direct versus a collateral consequence. After conducting such an analysis, it becomes clear that the majority opinion is flawed in two respects: first, the consequences of applicant's guilty pleas were direct, not collateral; and, second, even if they were collateral, counsel was nevertheless ineffective for not advising applicant of those consequences.

I. Factual Summary

Applicant pled guilty to the instant charges while his capital murder case was pending on direct appeal, and was sentenced to three concurrent 50-year sentences. Applicant contends that counsel was ineffective in failing to advise applicant the pleas could be used against him in the event his capital murder case was reversed and retried.

We initially remanded this application to the trial court to conduct an evidentiary hearing. At the hearing, counsel testified that he did not think the pleas were dangerous and he did not see any potential adverse effects to them. Counsel also testified he did not tell applicant the pleas could be used for impeachment if applicant testified at the retrial of his capital case. Finally, counsel testified he did not tell applicant that the pleas could be used by the State at a retrial to argue that a life sentence would not constitute punishment because applicant was already serving a 50-year sentence. Another lawyer testified that counsel said he (counsel) did not consider the consequences of the pleas in the event the capital case was reversed and retried, and if he (counsel) had considered such consequences, he would not have advised applicant to plead guilty.

II. Consequences Not Collateral

The instant case presents an issue of first impression in Texas, but many foreign jurisdictions have addressed the issue. The Fourth Circuit has held that when a defendant pleads guilty, the trial court need only advise the defendant of the direct consequences of the plea and not any collateral consequences. *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir.1973). The *Cuthrell* Court concluded: "The distinction between direct and collateral consequences of a plea . . . turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Id.* Several state courts have followed the *Cuthrell* standard in determining whether a consequence is direct or collateral. *See, e.g., Matter of Paschke*, 80 Wash.App. 439, 444,

909 P.2d 1328, 1331 (Wash.App. Div. 3 1996); *State v. Dugan*, 193 Wis.2d 610, 618, 534 N.W.2d 897, 900 (Wis.App.1995); *Adkins v. State*, 911 S.W.2d 334, 350 (Tenn.Cr.App.1994); *State v. Wika*, 464 N.W.2d 630, 634 (S.D.1991); *State v. Smith*, 207 Conn. 152, 160, 540 A.2d 679, 685 (Conn.1988); *Saadiq v. State*, 387 N.W.2d 315, 325 (Iowa 1986). Professor LaFave notes that the *Cuthrell* test is the usual, "albeit not foolproof," test for determining whether a consequence is direct or collateral. LaFave, Criminal Procedure, Vol. II, § 20.4(d).

While the line between direct and collateral consequences is not easily drawn, *Torrey v. Estelle*, 842 F.2d 234, 236, 238 (9th Cir.1988) (Canby, J., dissenting), and labels are not helpful in making the determination, *People v. Pozo*, 712 P.2d 1044, 1046 (Colo.App.1985) (noting that labeling a consequence as collateral "does not diminish its significance"), *rev'd on other grounds*, 746 P.2d 523 (Colo.1987), some consequences have been held to be collateral so the defendant need not be advised of them prior to pleading guilty. These include the loss of public or private employment, the effect on voting rights, a possible driver's license suspension and possible dishonorable discharge from the military. *State v. Heitzman*, 209 N.J.Super. 617, 508 A.2d 1161, 1164 (1986), *aff'd*, 107 N.J. 603, 527 A.2d 439 (1987). Also included in this list is the loss of the right to travel abroad and the loss of the right to possess firearms. *People v. Ford*, 86 N.Y.2d 397, 403, 633 N.Y.S.2d 270, 272-73, 657 N.E.2d 265, 267-68 (N.Y.1995).

The majority mentions deportation, possible enhancement of punishment, institution of civil commitment proceedings, loss of good time and possible consecutive sentences as additional collateral consequences.

Ante, at 536. And, I do not disagree that the situations listed in *Heitzman*, *Ford* and the majority opinion present collateral consequences of which a defendant need not be informed in order for his plea to be voluntary. Indeed, most of the aforementioned consequences are civil consequences only remotely related to the criminal case, and many of them are both indefinite and unforeseeable.

However, the instant case involves consequences quite different from those mentioned above. First, here we are faced with a pending criminal case, not some civil repercussion such as the loss of voting rights. Secondly, the criminal case was pending in the same county as the instant charges, and the same lawyer represented applicant on both the instant pleas and the pending criminal case. Undoubtedly, counsel was aware that applicant had a capital murder conviction and death sentence pending on direct appeal, and that applicant's pleas in the instant cases presented a risk if the capital case was reversed. Further, the fact that the pending case was a capital offense increases its significance in terms of the severity of any consequences these pleas may have. Moreover, there was a good possibility the capital case would be reversed on appeal.[1] Thus, there was also a good likelihood that applicant's pleas would later be used against him at the retrial of the capital case.

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[1] In the trial, the prosecutor posed a hypothetical question to a number of veniremen during the early portions of the voir dire which was clearly improper under *Lane v. State*, 743 S.W.2d 617 (Tex.Cr.App.1987), and *Gardner v. State*, 730 S.W.2d 675 (Tex.Cr.App.1987). Applicant preserved the error, and this Court's reversal followed. *Morrow v. State*, 753 S.W.2d 372 (Tex.Cr.App.1988).

Because the consequences in the instant case are so vastly different from those mentioned in *Heitzman* and *Ford*, the majority errs in relying on those cases to decide the instant issue. Considering the instant consequences on their own, it is clear they were consequences of which counsel was aware and they were not indirect, insignificant or unforeseeable. Therefore, they were not collateral. The majority errs to hold otherwise.

III. Ineffective Assistance of Counsel

Even if these consequences were collateral, counsel still had the duty to advise applicant of them. Noteworthy in many of the cases cited in both the majority opinion and here are that they involve claims regarding *the trial court's* failure to advise the defendant of the consequences of his plea. *United States v. Lambros*, 544 F.2d 962, 966 (8th Cir.1976); *Hutchison v. United States*, 450 F.2d 930, 931 (10th Cir.1971); *United States v. Vermeulen*, 436 F.2d 72, 75 (2nd Cir.1970); *Paschke*, 909 P.2d at 1331; *Dugan*, 534 N.W.2d at 900; *Smith*, 540 A.2d at 685. Several of the cases also involve a claim regarding counsel's failure to advise, but the courts in those cases conduct no separate analysis between the duties of counsel and the duties of the trial court. *Meaton v. United States*, 328 F.2d 379 (5th Cir.1964); *United States v. Cariola*, 323 F.2d 180, 185-86 (3rd Cir.1963); *Michel v. United States*, 507 F.2d 461, 465 (2nd Cir.1974); *Heitzman*, 508 A.2d at 1164.

However, several courts have discussed counsel's duties separately from the trial court's duties, and the

majority of those courts have limited the *Cuthrell* standard to trial courts and have used the standards enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), to evaluate a claim that *counsel* erred in failing to advise the defendant of the consequences of his plea. *Saadiq*, 387 N.W.2d at 325; *Torrey*, 842 F.2d at 236; *Ford*, 633 N.Y.S.2d at 272, 657 N.E.2d at 267; *see also*, *Pozo*, 712 P.2d at 1046.

In *People v. Garcia*, 799 P.2d 413, 415 (Colo.App.1990), *aff'd*, 815 P.2d 937 (Colo.1991), the Court noted that, although a trial court's duty is limited to advising the defendant of the direct consequences of his plea, "a challenge to a guilty plea based upon . . . ineffective assistance of counsel involves examination of quite different considerations." The *Garcia* court held: "Although a defendant need not be advised of all collateral consequences of a guilty plea, if counsel has reason to know that particular collateral consequences are a concern to a defendant, but fails to conduct appropriate research, then failure to advise the defendant properly of those consequences may constitute ineffective assistance of counsel if the failure resulted in prejudice." *Id.*, 799 P.2d at 415.

An Illinois court agrees. That court has held that it is a lawyer's duty to advise his client of the consequences of his guilty plea. In determining which consequences, the court concluded it was not necessary that it be a "certitude for it to be one defense counsel should discuss with the defendant before a guilty plea. Rather, it is only necessary that the consequence *may be material* to the client's interests. A consequence is material if, under all of the circumstances, including both the severity and the

likelihood of the particular consequence, it is one that may affect a client's decision to plead guilty." *People v. Miranda*, 184 Ill.App.3d 718, 133 Ill.Dec. 142, 147, 540 N.E.2d 1008, 1013 (Ill.App. 2 Dist.1989) (emphasis added).

Although the facts of the instant case are not common, my research has uncovered two cases involving very similar factual situations. Both cases are from Tennessee. *See, Teague v. State*, 772 S.W.2d 932 (Tenn.Crim.App.1988); *Adkins v. State*, 911 S.W.2d at 334. In *Teague*, the defendant was faced with a guilty plea while his conviction and death sentence in another case was pending on appeal. Counsel testified that he felt very good about the possibility that the death sentence would be reversed on appeal. The defendant asked counsel what effect, if any, his guilty plea would have if his death sentence were reversed, and counsel responded that it would have "absolutely no effect," and the defendant pled guilty. The death sentence was subsequently reversed and the new conviction was used by the State at the punishment phase of the capital case. Counsel testified that the advice he had given his client was "the worst advice I ever gave anybody."

Six years later, the same court was faced with a similar fact situation in *Adkins*. The defendant's death sentence was on appeal, and his lawyer failed to read the death penalty statute or advise the defendant of the effect that a guilty plea could have if the death sentence was reversed. Counsel testified he knew the death sentence was on appeal, and admitted he did not review the death penalty statute or advise the defendant of the possible consequences of a plea of guilty on the other case. However, counsel also testified he would have advised the

defendant to do exactly the same thing even if he had known of the potential consequences.

In *Teague*, the court granted relief, while in *Adkins*, the court denied relief. Significantly, in *Teague*, the court analyzed the ineffective assistance of counsel claim, relying on *Hill*, while the *Adkins* Court abandoned the *Hill* standard and relied instead on *Cuthrell*. As explained previously, *Cuthrell* pertains to claims regarding *the trial court's* failure to advise, not counsel's.

The reasoning of the line of cases relying on the *Strickland* and *Hill* standard is both sound and persuasive. Therefore, I would hold that when a defendant raises a claim of ineffective assistance of counsel for failure to advise of the consequences of a plea the correct standard is that enunciated in *Strickland* and *Hill*, not *Cuthrell;* the defendant must show counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This standard applies to challenges to guilty pleas; to prevail, applicant must show there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59, 106 S.Ct. at 370. Factors to be considered in determining whether counsel was effective include: (1) the amount of time spent in preparation of the defense; (2) whether advice was given which would promote an understanding of the law in relation to the facts; (3) whether the advice was reasonably competent; (4) whether the advice permits an informed and conscious choice; and, (5) whether the lawyer attempted to ascertain if the plea was voluntary and knowing. *Ex parte Morse*, 591 S.W.2d 904, 905 (Tex.Cr.App.1980).

IV. Application and Conclusion

Applying the *Hill* standard to the instant case, it is clear counsel's performance was deficient, and, but for counsel's deficient performance, applicant would not have pled guilty. As in *People v. Garcia*, 799 P.2d 413, counsel had reason to know that the impact of these guilty pleas on the capital case was a concern to applicant. Further, as in *People v. Miranda*, 184 Ill.App.3d 718, 133 Ill.Dec. 142, 540 N.E.2d 1008, this was a consequence which was material: the severity of the consequence was great because of the capital case pending on appeal and the likelihood that the pleas would be used against applicant at the retrial of the capital case was strong. Finally, under the factors of *Ex parte Morse*, 591 S.W.2d at 905, counsel's advice to applicant did not permit an informed and conscious choice. Therefore, counsel erred in failing to advise applicant the pleas could be used against him at the retrial of the capital murder case. Accordingly, applicant's pleas were involuntary as a result of counsel's ineffective representation.

For these reasons, I respectfully dissent to the majority's decision to deny relief.

OVERSTREET, J., joins this opinion.

MANDATE

FROM
COURT OF CRIMINAL APPEALS
Austin, Texas

THE STATE OF TEXAS,

TO THE 204TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY – GREETINGS:

Before our COURT OF CRIMINAL APPEALS, on the 1st day of October A.D. 1997 the cause upon an Application for Writ of Habeas Corpus styled

EX PARTE RICKY EUGENE MORROW
(Filed Oct. 30, 1997)

CCRA No. 72,593

Tr. Ct. No. W82-82402-Q(A), W82-82403-Q(A), W82-83706-Q (A)

was determined: and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the Application for Writ of Habeas Corpus, and the same being considered, because it is the Opinion of this Court that relief should be denied, it is **ORDERED, ADJUDGED AND DECREED** that said relief is **DENIED,** in accordance with the Opinion of this Court, and that this Decision be certified below for Observance."

The Applicant's Motion for Rehearing is Denied.

WHEREFORE, We command you to observe the order of our said **COURT OF CRIMINAL APPEALS** in

this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, THE HONORABLE MICHAEL J. McCORMICK, Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 17th day of October A.D. 1997.

TROY C. BENNETT, JR.
Clerk

/s/ Belva Myler Deputy Clerk